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No. 91-1535

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

JOHN BASH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

BRUCE I. HOCHMAN
AVRAM SALKIN
HOCHMAN, SALKIN and DeROY
A Professional Corporation

9150 Wilshire Boulevard, #300
Beverly Hills, California 90212
(310) 281-3200

Counsel for the Petitioner
JOHN BASH

Lorraine Mitchell Legal Briefs

732 E. WASHINGTON BOULEVARD
LOS ANGELES, CALIFORNIA 90021-3088
(213) 747-5631 • FAX: (213) 747-5843

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I.

OPENING STATEMENT

In his Petition for Writ of Certiorari, Mr. Bash argued that the District Court erroneously excluded certain evidentiary materials and limited his ability to testify with

respect to those materials, leaving the jury unable to determine whether he had a good faith belief that his conduct with respect to the church program and master recording program was legal. Accordingly, Mr. Bash argued that the District Court committed prejudicial error and that his convictions should, therefore, be reversed.

Respondent argued that the evidence was properly excluded because Mr. Bash never testified that he relied on the excluded materials. Further, Respondent argued that Mr. Bash was not prevented from testifying about the substance of the materials. Respondent's statements are inaccurate and misleading. The

primary purpose of this reply is to demonstrate that Mr. Bash was limited in his ability to testify as to the substance of the excluded materials and his reliance thereon.

In his Petition for Writ of Certiorari, Mr. Bash argued that he has wrongfully been convicted of multiple felonies based upon a single act. Respondent has cited case law in support of its position that a single act can support multiple convictions. This reply will demonstrate how the case law cited by Respondent is inapplicable in the present circumstance and is misleading.

II.

EXCLUDED MATERIALS

The District Court's rulings on the admissibility of the Exhibits set forth in Petitioner's Writ of Certiorari, pp. 16-18, and Mr. Bash's testimony in response thereto, was as follows:

(1) Oleck: Non-Profit Corporation; Organization and Associations, (Prentice-Hall 1979); Hopkins: The Law of Tax-Exempt Organizations, (Exhibits 101-17 and 101-18, respectively).

With respect to these two texts, the District Court stated:

> "Well, I don't have any problems with your asking him did he read some books. I am a long way from allowing the books themselves to go in at this

> juncture. . . . I will say to you what I said at this juncture is, if you want to say did you consult some books and hold them up in the air, I won't prevent you from doing that, but having the books themselves go to the jury, I'm not prepared to rule that way at this moment." (R.T. 1338, 1339)

In accordance with the Court's Order, Mr. Bash identified both texts. He also testified that he went to the law library when considering the legality of the church program and that he purchased these texts because he was not permitted to take them out from the law library. Mr. Bash also testified that he made notations in the books when reviewing them. (R.T. 1366, 1367, attached hereto as Appendix pages A-1 through A-6, respectively)

After this testimony was provided, defense counsel stated, with respect to the texts, "If you will just set those aside, perhaps the Judge would want to look at those. I don't know." (R.T. 1367, attached hereto as Appendix A-4 through A-6) Defense counsel then began questioning Mr. Bash on a different matter. The suggestion is that either the Court indicated to defense counsel that no further questions would be permitted with respect to the texts, or alternatively, defense counsel, in an attempt to comply with Court's earlier ruling, believed that no further questions were permitted. Ultimately, the court ruled that the

texts could note be admitted into evidence. (R.T. 1545)

(2) Universal Life Church book (Exhibit 101-19).

With respect to this Exhibit, the court ruled that it could be admitted for identification purposes only. (R.T. 1344) Mr. Bash testified that he attended seminars regarding the church program and, in accordance with the court's order, stated that he received this Exhibit at one of the seminars. (R.T. 1362, 1363, attached hereto as Appendix pages A-7 through A-12) Once Mr. Bash identified Exhibit 101-19, defense also stated, "You can set that aside now, sir. The Judge would like you to hand it to him." The

Court responded by saying, "Thank you, sir." (R.T. 1363, attached hereto as Appendix pages A-10 through A-12) Defense counsel then proceeded to question Mr. Bash on a new matter. Again, it appears that the Court either indicated that no further questions would be permitted with respect to this exhibit or, alternatively, defense counsel, in order to comply with the Court's earlier ruling, stopped his questioning with respect this exhibit and moved on to a new matter. After Mr. Bash's testimony, Exhibit 101-19 was admitted into evidence with the exception of the decision in Universal Life Church, Inc. v. United States, 372 F.Supp. 770 (E.D. Cal.

I974), which Mr. Bash believed substantiated the legitimacy of the church program.

(3) Offering Material relating to the Audio Leasing Corporation Program (Exhibit 101-20).

With respect to this Exhibit, the Court stated that: "I will allow you to inquire of [Mr. Bash] if that is where he got it. I am not saying all or any part of it necessarily will come in." (R.T. 1345) In accordance with the Court's ruling, Mr. Bash testified that he received these materials at a seminar on master leasing. (R.T. 1390, attached hereto as Appendix pages A-13 through A-15) Defense counsel then stated, "If you would set that

aside, if I may approach the witness and remove this -- following the Cayman seminar, did you immediately become involved with the master recordings or master leasings?" (R.T. 1390, attached hereto as Appendix pages A-13 through A-15) Defense counsel's abrupt departure from questioning Mr. Bash with respect to the exhibit itself, again evidences that the Court must have indicated that after Mr. Bash identified the exhibit no further questions would be permitted or, alternatively, defense counsel was attempting to comply with the Court's earlier ruling and, therefore, did not ask any additional questions.

(4) American Marketing Company 1982 Master Recording Program and the American Marketing Sales Kit (Exhibits 101-22 and 101-23, respectively), both containing excerpts from the court's opinion in EMI North American Holdings, Inc. v. United States, 675 F.2d 1068 (9th Cir. 1982) ("EMI Opinion"), which indicated the cost of the master recording could entitle the owner to an investment tax credit. When discussing the admissibility of these Exhibits the Court instructed defense counsel that the materials could "not be read or given to the jury at least for the time being." As a result of the District Court's ruling, Mr. Bash was unable to testify from the

Exhibits. However, he did identify that they were all brochures of the American Marketing Company program. (R.T. 1404, attached hereto as Appendix pages A-16 through A-18) Specifically, with respect to Exhibit 101-23, Mr. Bash indicated that this was the book he used when making a presentation to a prospective master recording lessee and that this brochure had everything he thought was "pertinent about the program". (R.T. 1404, attached hereto as Appendix pages A-16 through A-18) After Mr. Bash completed his testimony, these Exhibits were admitted into evidence, however, without the EMI Opinion.

It is difficult to see how the jury could determine whether Mr. Bash was in good faith when it was not allowed to see what he relied upon or hear why he relied on it.

III.

MULTIPLE FELONIES -- SINGLE ACT

In his Petition for Writ of Certiorari, Mr. Bash indicated that he was erroneously convicted on multiple counts when his single act with respect to a particular taxpayer led the taxpayer to file successive erroneous tax returns. Respondent contests this position arguing that a single act can lead to multiple felonies.

In support of its position that a defendant can be convicted on multiple counts with respect to a single act, Respondent cites the case of United States v. Spudic, 795 F.2d 1334 (7th Cir. 1986), where the defendant was convicted of both interstate transportation of a stolen motor vehicle and concealment of the same vehicle based on a single act of changing the vehicle's identification number. In Spudic, the defendant was charged with two different crimes stemming from the same act. Mr. Bash, however, was convicted of the same offense, based on a single act. The Court in Spudic noted that multiple convictions based on a single act are appropriate where the

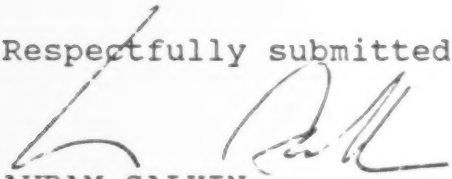
elements of each offense are different. In this instance, Mr. Bash has been convicted of the same crime on more than one count (i.e., the elements of each count are the same) based on a single act. Accordingly, for these reasons, United States v. Spudic, supra, does not support the position that Mr. Bash's single act of rendering advice could lead to multiple felonies.

IV.

CONCLUSION

For the reasons set forth in the Petition for Writ of Certiorari and those set forth above, it is respectfully requested that Mr. Bash's Petition be allowed.

Respectfully submitted,



AVRAM SALKIN

Counsel for Petitioner
JOHN BASH

HOCHMAN, SALKIN and DeROY
A Professional Corporation
9150 Wilshire Boulevard
Suite 300
Beverly Hills, California 90212

Telephone: 310/281-3200
FAX Number: 310/859-1430

APPENDIX

organization?

A. Yes. There were.

Q. Did you, aside from going to the -- you said you went to the county law library, right?

A. Right down the street.

Q. You are not yourself a lawyer?

A. No. I am not.

Q. Were you allowed access to the materials in the law library?

A. Yes.

Q. Did you check materials out?

A. I tried to check materials out. They told me I couldn't because

(R.T. 1366 Continued)

I wasn't an attorney, unless I posted a sum of money with them as a deposit. They gave me a non-lawyer library card.

Q. So you actually got a card from the law library?

A. I still have it.

MR. WILLIAMSON: If I may have the clerk place these on the witness stand, Your Honor. 101-17 and 101-18. Did you yourself, obtain other than by checking out the library, any other resource material that you looked at as part of your research in this issue?

A. These two books.

Q. Now, you have before you what has been marked, if you will

(R.T. 1366 Continued)

tell me, sir, 101-17 and 18; is that right?

A. Yes.

Q. For identification. Those two books are books which you purchased yourself?

A. Yes. I purchased these books myself.

Q. In fact, you do, either one or both of these books have notations in them placed there by you when you were reviewing them?

A. Yes.

Q. Which one are you looking at presently?

A. The Law of Tax Exempt Organizations.

Q. And how about the other book? By the way, what exhibit

(R.T. 1367 Continued)

number is The Law of Tax Exempt Organizations?

A. 101-18.

Q. And the other exhibit, 101-17, is entitled what, sir?

A. Nonprofit Corporations, Organizations and Associations.

Q. If you would just set those aside, perhaps the Judge would want to look at those. I don't know.

Eventually, did you take steps to put together a church organization?

A. Yes. I did.

Q. Did you do that by yourself or with anyone else?

A. Initially, it was with Greg Moeller and Tom Benzing.

(R.T. 1367 Continued)

Q. Did Mr. Moeller at some point set out of the

Q. And specifically, did you attend any other seminars or programs on the same subject?

A. Yes. I did attend other seminars.

Q. Can you tell us very generally what program you attended, or programs and where they were?

A. I attended at least two other programs of the Drexler organization which was Freedom Foundation. They were located up off of University Avenue. I think it was around Fairmont in the University areas, somewhere up in that region. I don't recollect if I drove by -- if I drove by, I would be able to point it out.

(R.T. 1362 Continued)

Q. Did you attend any programs outside of the San Diego area?

A. Yes. I did.

Q. Where was that?

A. Mr. Moeller had heard about a seminar that was going to be held in the Santa Ana area from a company or group called the Universal Life Church.

Q. Did you attend that program?

A. Yes. I did.

Q. And about when was that? Are we still in the early part of 1980?

A. Yes.

(R.T. 1362 Continued)

MR. WILLIAMSON: Your Honor, I ask the Court to present to the witness what has been marked for identification

101-19. I will not be at this time moving this into evidence.

Now, Mr. Bash, if you would look at what has been marked 101-19 and simply identify what that is or it appears to be?

A. This is a copy of the handouts that they gave to me at the meeting of this Universal Life Church.

Q. Is this the one that you attended with Mr. Moeller?

A. Yes.

Q. You can set that aside now, sir. The Judge would like you to hand it to him.

THE COURT: Thank you, sir.

(R.T. 1363 Continued)

Q. I take it you took some materials away from that program with you?

A. Yes. I also had an audio tape. I took a personal tape recorder and taped the presentation.

Q. Either after or before, around the same time as you were going to these various programs on the church issue; did you do anything else independently to look into the question of this type of program?

A. Yes. I did.

Q. Can you tell the ladies and gentlemen some of the steps that you took?

(R.T. 1363 Continued)

A. Well, I went to the San Diego law library and pulled some books out on nonprofit organizations to see what the legalities were. I also went to look to see, if I remember

Mr. Bash, I ask you to look at what has been marked for identification 101-20 and without discussing it or describing the contents of that, does that appear to be some materials that you received at the Grand Caymans or a Grand Cayman seminar on master leasing?

A. Yes.

Q. If you would set that aside, if I may approach the witness and remove this -- following the Cayman seminar, did you immediately become involved with master recordings or master leasings?

A. No.

(R.T. 1390 Continued)

Q. You were, however, involved with these oil and gas ventures that we heard about?

A. Yes.

Q. And was it about the same time, late eighties, maybe '81, at that point, that you also, got involved in the real estate ventures that we have heard Mr. Novack talk about?

A. What time frame?

Q. After the end of 1980 and the beginning of '81? It was after that?

A. Yes. It was after that.

Q. About when was your involvement with those programs?

(R.T. 1390 Continued)

A. The real estate programs, as I recall, we started looking into it in late '81 and got one together in early '82.

Q. On the subject of the oil and gas program --

A. Yes. I recognize them.

Q. Very generally, all three of those are brochures in some form or another for the AMC program; is that right, sir?

A. Yes.

Q. And the first of these three bearing number 101-21, is it?

A. The first?

Q. Yes.

A. This was the original brochure.

Q. That was for what year, sir?

A. 1981.

Q. The next one, 101-22, would have been for what year, sir?

(R.T. 1404 Continued)

A. This I believe, '82, it could have been '83, but I believe '82.

Q. And that contains materials in addition to that which we have an exhibit a tape and record?

A. Yes. There was a sample put in, so the prospective people could listen and see what it sounded like.

Q. Finally, 101-23.

A. This was my personal book that I used when I made presentations to people to buy. I had all of the things in here that I thought were pertinent about the program, attorney letter, the lease itself, the production company, things about Mr.

(R.T. 1404 Continued)

Gallo, the Troubadour Recording brochure, Troubadour